Supreme Court, U.S.
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No. 02-92

IN THE

SUPREME COURT OF THE UNITED STATES

WESTINGHOUSE ELECTRIC CORPORATION,

Petitioner,

v.

WORKERS' COMPENSATION APPEAL BOARD
and
MILTON MARKOVICH,

Respondents.

On Petition for Writ of Certiorari
To The Pennsylvania Supreme Court

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED FOR REVIEW

A. **QUESTION:** WHETHER THE WORKERS' COMPENSATION JUDGE VIOLATED EMPLOYER'S CONSTITUTIONALLY GUARANTEED RIGHT TO DUE PROCESS OF LAW BY RENDERING A DECISION AND BASING FINDINGS OF FACT UPON AN "INVESTIGATION" CONDUCTED BY THE WORKERS' COMPENSATION JUDGE AFTER THE CLOSE OF THE RECORD AND WITHOUT NOTICE TO THE PARTIES, OPPORTUNITY TO DEFEND, OR THE OPPORTUNITY TO CONDUCT CROSS-EXAMINATION OF SAID WITNESS(ES)?

ANSWER: YES. THE WORKERS' COMPENSATION JUDGE VIOLATED EMPLOYER'S CONSTITUTIONALLY GUARANTEED RIGHT TO DUE PROCESS OF LAW BY RENDERING A DECISION AND BASING FINDINGS OF FACT UPON AN "INVESTIGATION" CONDUCTED BY THE WORKERS' COMPENSATION JUDGE AFTER THE CLOSE OF THE RECORD AND WITHOUT NOTICE TO THE PARTIES, OPPORTUNITY TO DEFEND, OR THE OPPORTUNITY TO CONDUCT CROSS-EXAMINATION OF SAID WITNESS(ES).

II. LIST OF PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The Petitioner is Westinghouse Electric Corporation.

The Respondents are the Workers' Compensation Appeal Board of the Commonwealth of Pennsylvania and Milton Markovich.

Pursuant to U.S. Supreme Court Rule 29.6, Petitioner is a wholly-owned subsidiary of Viacom, Inc., through Viacom's acquisition of majority ownership in CBS, Corporation.

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3. Westinghouse Electric Corporation v. Workers' Compensation Appeal Board (Markovich), No. 116 C.D. 2001, Opinion and Order of the Commonwealth Court, dated September 14, 2001;
4. Westinghouse Electric Corporation v. Workers' Compensation Appeal Board (Markovich), No. 580 WAL 2001, Order of the Supreme Court of Pennsylvania, dated March 5, 2002; and
5. Westinghouse Electric Corporation v. Workers' Compensation Appeal Board (Markovich), No. 580 WAL 2001, Order of the Supreme Court of Pennsylvania, dated April 12, 2002.

VI. CONCISE STATEMENT OF THE BASIS OF JURISDICTION

Petitioner seeks review of the Order of the Pennsylvania Supreme Court dated April 12, 2002, denying Petitioner's Petition for Reconsideration of Denial of Petition for Allowance of Appeal and Petition for Supersedeas.

Petitioner seeks review pursuant to 28 U.S.C. § 1257(a).

Pursuant to U.S. Supreme Court Rule 29.4(c), Petitioner asserts that 28 U.S.C. § 2403(b) may apply and, as such, the Attorney General for the Commonwealth of Pennsylvania has been served with the within Petition for Writ of Certiorari.

Pursuant to 28 U.S.C. § 2403(b), the Pennsylvania Supreme Court has not certified to the Attorney General for the Commonwealth of Pennsylvania the fact that the Constitutionality of the Pennsylvania Workers' Compensation Act has been drawn into question.

VII. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

United States Constitution

Amendment XIV, Section 1 provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Amendment XIV, Section 1.

Pennsylvania Workers' Compensation Act

Section 418 of the Pennsylvania Workers' Compensation Act provides as follows:

> The referee to whom a petition is assigned for hearing, may subpoena witnesses, order the production of books and other writings, and hear evidence, shall make a record of hearings, and shall make, in writing and as soon as may be after the conclusion of the hearing, such findings of fact, conclusions of law, and award or disallowance of compensation or other order, as the petition and answers and the evidence produced before him and the provisions of this act shall, in his judgement, require. The findings of fact made by a referee to whom a petition has been assigned or any question of fact has been referred under the provisions of

section four hundred and nineteen shall be final, unless an appeal is taken as provided in this act.

Section 418 of the Pennsylvania Workers' Compensation Act of June 2, 1915, P.L. 736, as amended, 77 P.S. § 833.

Section 420(a) of the Pennsylvania Workers' Compensation Act provides as follow:

> The board, the department or a workers' compensation judge, if it or he deem it necessary, may, of its or his own motion, either before, during, or after any hearing, make or cause to be made an investigation of the facts set forth in the petition or answer of facts pertinent in any injury under this act. The board, department or workers' compensation judge may appoint one or more impartial physicians or surgeons to examine the injuries of the plaintiff and report thereon, or may employ the services of such other experts as shall appear necessary to ascertain the facts. The workers' compensation judge when necessary or appropriate or upon request of a party in order to rule on requests for review filed under section 306(f.1), or under other provisions of this act, may ask for an opinion from peer review about the necessity or frequency of treatment under section 306(f.1). The peer review report or the peer report of any physician, surgeon, or expert appointed by the department or by a workers' compensation judge, including the report of a peer review organization, shall be filed with the board or workers' compensation judge, as the case may be, and shall be a part of the record and open to inspection as such. The workers' compensation judge shall consider the

report as evidence but shall not be bound by the report.

Section 420(a) of the Pennsylvania Workers' Compensation Act of June 2, 1915, P.L. 736, as amended, 77 P.S. § 831.

Section 437 of the Pennsylvania Workers' Compensation Act provides as follows:

> The board, department and any referee shall have the power to conduct any investigation which may be deemed necessary in any matter properly before them. Such investigations may be made by the board or referee personally, or by any officer of employe of the department, or by any inspector of the department, or by any person or persons authorized by law. Every inspector and employe of the department is hereby empowered and directed to conduct any investigation authorized by this act, at the request of the board, department or any referee, with the consent of the secretary.

Section 437 of the Pennsylvania Workers' Compensation Act of June 2, 1915, P.L. 736, as amended, 77 P.S. § 993.

Section 422 of the Pennsylvania Workers' Compensation Act provides as follows:

> Neither the board nor any of its members nor any referee shall be bound by the common law or statutory rules of evidence in conducting any hearing or investigation, but all findings of fact shall be based upon sufficient competent evidence to justify same.

Section 422 of the Pennsylvania Workers' Compensation Act of June 2, 1915, P.L. 736, as amended, 77. P.S. § 834.

VIII. CONCISE STATEMENT OF THE CASE

After the close of the record and without notice to either party or opportunity to defend, the Workers' Compensation Judge contacted an unnamed individual(s) to provide secret testimony to the Workers' Compensation Judge. Based upon this "investigation," allegedly authorized by the Pennsylvania Workers' Compensation Act, the Workers' Compensation Judge rendered a Decision, denying Employer's (Westinghouse Electric Corporation) request to modify Employee's (Milton Markovich) Workers' Compensation benefits.

Employer asserts that the actions of the Workers' Compensation Judge were an egregious violation of Employer's due process rights conferred by Amendment XIV, Section 1 of the United States Constitution.

The present litigation was commenced on October 31, 1997, when Employer filed a Petition to Modify Compensation Benefits, alleging that Employee failed and/or refused to attend scheduled employment interviews at Today's Temporary on September 12, 1997, September 16, 1997 and September 25, 1997, entitling Employer to a modification/suspension of Employee's Workers' Compensation benefits.[1] (R. 6-7a.)

Employee was previously found to have sustained a work-related injury pursuant to Judge's Decision dated December 30, 1993. The nature of Employee's work-related injury was found to be an asthmatic condition due to his exposure to trichloroethylene during the course and scope of his employment with Employer. (R. 180-189a.) Employee was awarded Workers' Compensation benefits of $336.00 per week based

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[1]Employer also filed a Petition to Terminate Compensation Benefits, which was denied by the Workers' Compensation Judge, and which does not form the basis of Petitioner's Petition for Writ of Certiorari.

upon an average weekly wage of $507.60. (R. 183a.)

Employer's request for a modification/ suspension of Employee's Workers' Compensation Benefits in the matter sub judice was premised upon the Pennsylvania Supreme Court's decision in Kachinski v. Workmen's Compensation Appeal Board (Vepco Construction Company), 532 A.2d 374 (Pa. 1987).

Pursuant to Kachinski, Employer is entitled to a modification of Employee's Workers' Compensation benefits if Employer can establish that work is available to Employee, within his work-related restrictions, and Employee failed to act in good faith in following through with the referred positions. Id., p. 380.

Employer's Petition to Modify Compensation Benefits was assigned to Workers' Compensation Judge John Cassidy, who subsequently conducted the "investigation" in question, and rendered the Judge's Decision on appeal. (R. 4a, 8a, 9-22a.)

Six hearings were held before the Workers' Compensation Judge, at which Employer offered the deposition testimony of Georgette Gerben, a vocational expert; Scott Livingstone, Territory Manager for Today's Temporary; and Gregory J. Fino, M.D.

Employer offered the testimony of Ms. Gerben, a vocational expert, to establish that Employee had failed to act in good faith in failing to attend three scheduled interviews with Today's Temporary and in failing to attend six other scheduled interviews on the dates and times requested by Ms. Gerben.

Ms. Gerben testified that she referred Employee on three separate occasions to interviews with Today's Temporary; however, Employee failed and/or refused to appear for the interviews. (R. 382-383a.)

Ms. Gerben also testified that she referred Employee to available positions with Monroeville Chrysler Plymouth, Econo Lodge, Harley Hotel, Comfort Inn, Denny's and Dante's

Fashion; however, Employee failed to interview with the prospective employers on the dates and times as requested in her letters to Employee. (R. 368-381a.)

Also in support of Employer's Petition to Modify Compensation Benefits, Employer offered the deposition testimony of Scott Livingstone, territory manager for Today's Temporary. The purpose of Mr. Livingstone's testimony was again, to establish bad faith on the part of Employee, entitling Employer to a modification/ suspension of Employee's Workers' Compensation benefits.

Mr. Livingstone testified that Employee was scheduled to interview with Today's Temporary on September 12, 16 and 25, 1997, but did not attend the interviews. (R. 333-335a, 341a.)

Mr. Livingstone testified that Employee was to interview for basic clerical positions which paid $6.00 to $8.00 per hour. (R. 335-336a.) The purpose of the interview was to evaluate Employee's skills, and perform testing so that Employee could be placed in a position with one of Today's Temporary's clients. (R. 334-336a.)

During the deposition of Mr. Livingstone, the parties stipulated that Employee did not attend the three interviews scheduled with Today's Temporary. (R. 338a.)

Despite the fact that Employer offered the deposition testimony of Mr. Livingstone, subsequent to the close of the record, the Workers' Compensation contacted an unnamed individual or individuals at Today's Temporary. The nature and content of the contact was first revealed to the parties by the Judge's Decision, and even then, not fully disclosed. (R. 19a.; Appendix A-14 to A15.)

Lastly, in support of Employer's Petition to Modify Compensation Benefits, Employer offered the deposition testimony of Gregory Fino, M.D., board certified in internal medicine and pulmonary disease.

Dr. Fino testified that he conducted a physical examination of Employee on February 20, 1997, on behalf of Employer. (R. 232a.) Dr. Fino opined that Employee suffered from hyperactive airway disease due to previous smoking and asthma. (R. 238a.)

Dr. Fino testified that, assuming that Employee suffered from occupationally induced asthma, Employee did not have any pulmonary function disability due to the occupationally induced asthma at the time of his examination. (R. 239a.)

Additionally, Dr. Fino completed an Affidavit of Recovery and released Employee to heavy work. (R. 239a, 305-306a.).

Employer offered the deposition testimony of Dr. Fino to fulfill Employer's burden of proof, pursuant to Kachinski, that the positions with Today's Temporary, as well as the six other referred positions, were within Employee's work-related restrictions.

In defense of Employer's Petitions to Modify Compensation Benefits, Employee testified on his own behalf and offered the deposition testimony of Michael Wald, M.D.

Employee testified that he did not interview with Today's Temporary as he felt as though it was the "third duck in a row" because Occupational Resources was "subletting this out to Today's Temporary." (R. 175a.)

With respect to the six other referred positions, Employee testified that he did not interview on the dates and times requested by Ms. Gerben because he did not know that he was to do so. (R. 173a; Appendix A-14.)

Also in defense of Employer's Petition to Modify Compensation Benefits, Employee offered the deposition testimony of Michael Wald, M.D.

Dr. Wald testified that Employee continued to suffer from occupationally induced asthma and, as a result, Employee was limited from performing heavy duty work. (R. 762a; 765a.) However, Dr. Wald did testify that Employee was capable of performing light duty work. (R. 763a.)

At some undisclosed time, after the close of the record and submission of Proposed Findings of Fact and Conclusions of Law by the parties, the Workers' Compensation Judge conducted an "investigation" allegedly authorized by Sections 420(a), 437 and 422 of the Pennsylvania Workers' Compensation Act.

Not until the Workers' Compensation Judge issued the Judge's Decision on January 12, 2000, were the parties given notice that the Workers' Compensation Judge conducted a unilateral "investigation" and rendered findings of fact based upon the results of his inquiry.

By Judge's Decision dated January 12, 2000, the Workers' Compensation Judge denied Employer's Petition to Modify Compensation Benefits, finding that Today's Temporary, was not gainful employment for which Employee's benefits should be modified based upon Employee's failure to attend three separate interviews. (R. 19a; Appendix A-15.)

In denying Employer's Petition to Modify Compensation Benefits, the Workers' Compensation Judge found as fact that he engaged in a "conversation" with an unnamed individual(s) with Today's Temporary. (R. 19a.; Appendix A-14 to A-15.) Based upon this "conversation," the Workers' Compensation Judge found as fact that no viable employment opportunities existed with Today's Temporary:

> In my conversation with Today's Temporary which should be noted that is now called Today's Staffing, this Judge found that there was no employment in Today's Temporary Service for the claimant [Employee] but rather, they hold a list of individuals where they're able to offer to different employees in and around the city of Pittsburgh, Pennsylvania.

(R. 19a.; Appendix A-14 to A-15.)

The Workers' Compensation Judge initiated this "conversation," despite the fact that

Employer had offered the deposition testimony of Ms. Gerben, as well as Mr. Livingstone, who both testified that employment opportunities existed with Today's Temporary. (R. 389a, 335a.)

The Workers' Compensation Judge also found that Employee did not act in bad faith in failing to apply for interviews with prospective employers on the dates and times as requested by Ms. Gerben. (R.19a; Appendix A-15.)

However, the Workers' Compensation Judge did find that Employee was capable of performing light duty work based upon the credible testimony of Dr. Wald. (R. 15a; Appendix A-8.)

From the Judge's Decision of January 12, 2000, Employer filed a timely appeal of the Judge's dismissal of Employer's Petition to Modify Compensation Benefits to the Workers' Compensation Appeal Board for the Commonwealth of Pennsylvania. (R. 23-30a.)

Employer appealed on a variety of grounds, including the following:

> The Workers' Compensation Judge erred in basing his findings and decision on facts not of record as a result of the Workers' Compensation Judge's "investigation," without notice to the parties or the opportunity to cross-examine the sources of his information or the opportunity to be heard, constituting a denial of due process of law.

(R. 28a.)

By Decision and Order dated December 14, 2000, the Workers' Compensation Appeal Board affirmed the Judge's Decision of January 12, 2000. (R. 31-45a; Appendix A-20 to A-33.)

With respect to Employer's argument that the Workers' Compensation Judge violated Employer's due process rights, the Workers' Compensation Appeal Board held that the issue was moot because Employer failed to refer Employee to a then-open position. In the

alternative, the Workers' Compensation Appeal Board held that the Workers' Compensation Judge acted properly because the Pennsylvania Workers' Compensation Act confers upon Workers' Compensation judges "broad authority" to conduct investigations "either before, during or after any hearing." (R. 39a; Appendix A-27 to A-28.)

From the Opinion and Order of the Workers' Compensation Appeal Board, Employer filed a timely Petition to Review with the Commonwealth Court of Pennsylvania, preserving Employer's constitutional grounds of appeal. (R. 46-52a.)

By Opinion and Order dated September 14, 2001, the Commonwealth Court affirmed the Opinion and Order of the Workers' Compensation Appeal Board. (Appendix A-34 to A-48.)

While the Commonwealth Court questioned the wisdom of Sections 418, 420 and 437 of the Workers' Compensation Act, conferring authority upon a Workers' Compensation judge to conduct an investigation either before, during or after any hearing, the Commonwealth Court failed to address the constitutionality of the Judge's actions, holding that Employer failed to prove reversible error. (Appendix A-47.)

From said Opinion and Order, Employer filed a timely Petition for Allowance of Appeal to the Pennsylvania Supreme Court.

By Order dated March 5, 2002, Employer's Petition for Allowance of Appeal was denied. (Appendix A-49.)

Employer filed a timely Petition for Reconsideration to the Pennsylvania Supreme Court which was denied by Order dated April 12, 2002. (Appendix A-50.)

From said denial, Employer has filed the within Petition for Writ of Certiorari with this Honorable Court.

IX. CONCISE ARGUMENT

A. THE WORKERS' COMPENSATION JUDGE VIOLATED EMPLOYER'S CONSTITUTIONALLY GUARANTEED RIGHT TO DUE PROCESS OF LAW BY RENDERING A DECISION AND BASING FINDINGS OF FACT UPON AN "INVESTIGATION" CONDUCTED BY THE WORKERS' COMPENSATION JUDGE AFTER THE CLOSE OF THE RECORD AND WITHOUT NOTICE TO THE PARTIES OR THE OPPORTUNITY TO CONDUCT CROSS-EXAMINATION OF SAID WITNESS(ES)

In flagrant disregard of one of the most fundamental principles of jurisprudence, the Workers' Compensation Judge conducted an "investigation" which denied Employer the fundamental due process rights of timely notice, opportunity to be heard and cross-examination of witnesses. And, even though the Workers' Compensation Judge's actions were loosely sanctioned by the Pennsylvania Workers' Compensation Act, the Judge's actions, as applied to Employer, constituted a deprivation of Employer's due process rights guaranteed by Amendment XIV of the United States Constitution.

By Judge's Decision dated January 12, 2000, the Workers' Compensation Judge denied Employer's Petition to Modify Compensation Benefits, which was based upon Employee's failure to attend three scheduled interviews with Today's Temporary, a temporary employment agency. Employee's failure to attend three scheduled interviews, if so found by the Workers' Compensation Judge, is a sufficient, competent basis to suspend/modify Employee's Workers' Compensation benefits. Kachinski, p. 380.

However, the Workers' Compensation Judge circumvented this legal conclusion by conducting an alleged independent "investigation" as to the nature of Today's Temporary after the close of the record. (R. 19a; Appendix A-14 to A-15.) Neither the "investigation," nor the results of the

investigation, were revealed to Employer until the Workers' Compensation Judge rendered a decision pursuant to Sections 418 and 422(a) of the Pennsylvania Workers' Compensation Act of June 2, 1915, P.L. 736, as amended, 77 P.S. § 833, 834.

In fact, the first time Employer learned that the Workers' Compensation Judge had conducted an independent "investigation" was upon reading Finding of Fact No. 19 of the Judge's Decision, in which the Workers' Compensation Judge found as follows:

> As the request for modification by the defendant employer [Employer] is for the position of Today's Temporary Service, this Judge takes judicial notice that the correspondence submitted as part of exhibits by the defendants does not indicate a specific job or rate of pay to which the claimant [Employee] is applying for employment. **In my conversation with Today's Temporary which should be noted that is now called Today's Staffing, this Judge found that there was no employment in Today's Temporary Service for the claimant [Employee], but rather, they hold a list of individuals where they're able to offer to different employees in and around the city of Pittsburgh, Pennsylvania.** This Judge goes on to note that the individual testifying on behalf of Temporary Service which is Scott Livingstone, is not certified as a rehabilitation consultant or specialist. Therefore, this Workers' Compensation Judge finds that Today's Temporary Service is not gainful employment that the claimant [Employee] had an opportunity to obtain while being vocationalized through Occupational Resource Specialists, Inc., the employer for Georgette Gerben.

(R. 19a; Appendix A-14 to A-15; emphasis added.)

Upon reviewing Finding of Fact No. 19, there can be no dispute that the Workers' Compensation Judge conducted an independent "investigation" as to the nature of Today's Temporary. This is in spite of the fact that Employer submitted the deposition testimony of Scott Livingstone, Territory Manager for Today's Temporary. (R. 327-351a.)

Employer submits that the Workers' Compensation Judge's actions, whether statutorily sanctioned or not by Sections 420(a), 437 and 422 of the Workers' Compensation Act, constituted a violation of Employer's due process rights.

Section 420(a) of the Pennsylvania Workers' Compensation Act provides as follows:

> The board, the department or **a workers' compensation judge, if it or he deem it necessary, may, of its or his own motion, either before, during, or after any hearing, make or cause to be made an investigation of the facts set forth in the petition or answer of facts pertinent in any injury under this act.** The board, department or workers' compensation judge may appoint one or more impartial physicians or surgeons to examine the injuries of the plaintiff and report thereon, or may employ the services of such other experts as shall appear necessary to ascertain the facts. The workers' compensation judge when necessary or appropriate or upon request of a party in order to rule on requests for review filed under section 306(f.1), or under other provisions of this act, may ask for an opinion from peer review about the necessity or frequency of treatment under section 306(f.1). The peer review report or the peer report of any physician, surgeon, or expert

> appointed by the department or by a workers' compensation judge, including the report of a peer review organization, shall be filed with the board or workers' compensation judge, as the case may be, and shall be a part of the record and open to inspection as such. The workers' compensation judge shall consider the report as evidence but shall not be bound by the report.

Section 420(a) of the Pennsylvania Workers' Compensation Act of June 2, 1915, P.L. 736, as amended, 77 P.S. § 831 (emphasis added).

However, Employer submits that the Workers' Compensation Judge's powers to conduct an "investigation" pursuant to Section 420(a) are limited to situations where the Workers' Compensation Judge deems it necessary to employ the services of experts to ascertain the facts.

As the Workers' Compensation Judge did not employ the service of an expert, but conducted his own investigation, Section 420(a) is not applicable to the present situation.

However, even if Section 420(a) empowers the Workers' Compensation Judge to conduct an "investigation," such an "investigation" cannot violate Employer's fundamental due process rights.

Section 437 of the Pennsylvania Workers' Compensation Act also references the authority of a Workers' Compensation judge to conduct an investigation:

> **The board, department and any referee shall have the power to conduct any investigation which may be deemed necessary in any matter properly before them. Such investigations may be made by the board or referee personally, or by any officer of employe of the department, or by any inspector of the department, or by any person or persons authorized by law.** Every inspector and employe of the department is hereby empowered and

> directed to conduct any investigation authorized by this act, at the request of the board, department or any referee, with the consent of the secretary.

Section 437, of the Pennsylvania Workers' Compensation Act of June 2, 1915, P.L. 736, as amended, 77 P.S.77 P.S. § 993 (emphasis added).

Despite the seemingly limitless power conferred upon a Workers' Compensation judge to conduct an investigation pursuant to Section 437, Employer submits that Section 437 must be read in para material with Section 422 of the Pennsylvania Workers' Compensation Act, which limits the application of Section 437 so as not to be applied in a manner which deprives Employer of its procedural due process rights.

Section 422 of the Pennsylvania Workers' Compensation Act provides as follows:

> Neither the board nor any of its members nor any referee shall be bound by the common law or statutory rules of evidence in conducting any hearing or investigation, but all findings of fact shall be based upon sufficient competent evidence to justify same.

Section 422, of the Pennsylvania Workers' Compensation Act of June 2, 1915, P.L. 736, as amended, 77 P.S. § 834.

In dismissing Employer's argument, the Workers' Compensation Appeal Board noted as follows:

> Again, given the conclusion of the WCJ that the Defendant never properly referred the Claimant [Employee] to a then-available position at Today's Temporary, this argument is also moot. Furthermore, the Act gives the WCJ broad authority to investigate on his own motion facts set forth in any petition. The investigation can be conducted either before, during or after any hearing. See, Sections 418, 420, 436 and 437 of the Act, 77 P.S. §§ 833, 831, 992 and 993.

(R. 39a; Appendix A-27 to A-28.)

The Workers' Compensation Appeal Board either ignored or failed to appreciate Employer's argument that the actions of the Workers' Compensation Judge, whether authorized or not by the Pennsylvania Workers' Compensation Act, violated Employer's due process rights.

While the Commonwealth Court of Pennsylvania was more sympathetic to Employer's position, the Court affirmed the Judge's Decision as it held that Employer failed to prove that the alleged error was harmful:

> Sections 418, 420 and 437 of the Worker's Compensation Act (Act) give the WCJ broad authority to investigate. The WCJ may investigate either before, during or after any hearing. 77 P.S. §831, 833, 993. These sections of the Act do not provide authority to deny fundamental rights such as "confronting, cross-examining and refuting witnesses." City of Pittsburgh v. Workmen's Compensation Appeal Board (Sherred), 315 A.2d 901, 903 (Pa. Cmwlth. 1974).
>
> While this Court questions the wisdom of this legislatively authorized practice, critically in this instance, Employer does not assert how it has been harmed by its inability to cross-examine the witness that the WCJ interviewed. "To establish reversible error, the complaining party must prove that the court erred and that the error was harmful. Amoco Oil Co. v. Commonwealth Dept. of Transportation, 679 A.2d 1369, 1372 (Pa. Cmwlth. 1996), appeal denied, 547 Pa. 758, 692 A.2d 567 (1997).
>
> This Court agrees with the Board that the question whether the WCJ properly conducted this investigation becomes irrelevant when the Employer

> did not first establish that it referred Claimant [Employee] to a then open position at Today's Temporary. Since Employer failed to meet this prerequisite there was never an obligation on Claimant's [Employee's] part to interview at Today's Temporary.
>
> In any event, the WCJ's independent investigation constituted harmless error. "Whether a fact-finder commits harmless error is a question for appellate review designed to advance judicial economy by obviating the necessity for a retrial where the appellate court is convinced that an error is harmless beyond a reasonable doubt." Harmon v. Mifflin County School District, 684 A.2d 651, 657 (Pa. Cmwlth. 1996), appeal denied, 548 Pa. 227, 696 A.3d 805 (1997).

(Appendix A-46 to A-47.)

While Sections 418, 420(a) and 437 of the Workers' Compensation Act refer to the power of a Workers' Compensation judge to conduct an "investigation," Employer submits that said provisions of the Workers' Compensation Act must be read in pari materia with Section 422.

In interpreting Section 422, the Commonwealth Court has consistently held that the "relaxation" of the rules of evidence cannot be applied in such a manner as to deny due process of law. See, City of Pittsburgh v. Workers' Compensation Appeal Board (Sherred), 315 A.2d 901, 903 (Pa. Cmwlth. 1974), where the Pennsylvania Commonwealth Court noted that Section 422 could not be applied in such a manner to deny parties the fundamental rights of confronting, cross-examining and refuting witnesses; Philadelphia Electric Company v. Workers' Compensation Appeal Board (Vona), 564 A.2d 548, 550 (Pa. Cmwlth. 1989), where the Pennsylvania Commonwealth Court noted that although "a relaxation of the rules of evidence is statutorily permitted, compensation

authorities may not circumscribe fundamental rights"; and Cowan v. Bunting Glider Co., 49 A.2d 270, 271 (Pa. Super. 46), in which the Pennsylvania Superior Court stated that there was a fine line between a trier of fact becoming an impermissible witness.

While critical of the Workers' Compensation Judge's actions, the Commonwealth Court failed to adhere to its long-standing precedent that the relaxation of rules in the Workers' Compensation proceedings, cannot be applied in such a manner so as to deprive a party its fundamental due process rights.

One of the fundamental rights guaranteed by the Fourteenth Amendment is the notice to the party, not only of the adverse action taken, but the evidence upon which the action is based.

Justice Brennan, in Goldberg v. Kelly, 397 U.S. 254 (1970), reiterated the following fundamental principles of due process:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, **the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.** While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individual whose memory might be faulty or who, in fact, might be perjurers or person motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. **We have formalized these protections in the requirements of confrontation and cross-examination.** They have ancient roots. They find expression in the Sixth Amendment . . .. This Court has

> been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny.

Id., p. 270, citing Greene v. McElroy, 360 U.S. 474, 496-497 (1959) (emphasis added).

Because Goldberg reaffirmed the applicability of procedural due process in a pre-termination welfare hearing, held prior to a final hearing, Justice Brennan's words are equally applicable to the matter sub judice, when the lack of procedural due process occurs after the close of the record and just prior to a final decision.

Clearly, in the present matter, Employer was given no notice, either prior to, during, or after, the Workers' Compensation Judge's conversation with an unnamed individual(s) at Today's Temporary.

Having not been given notice, Employer was denied the fundamental right to confront and cross-examine witnesses. As Justice Stevens stated in his dissent in Broack v. Roadway Express, Inc., 481 U.S. 252, 276 (1987): "Cross-examination is a critical element in the truth-determining process."

Additionally, Justice Stevens aptly noted in Broack that ex parte proceedings, such as occurred in the matter sub judice, are greatly disfavored:

> Traditions of fairness that have been long honored in American jurisprudence support the strongest possible presumption against ex parte proceedings. There is no support for the plurality's approval of the entry of a reinstatement order of indefinite duration based on uncross-examined and untested evidence.

Id., p. 278.

In Richardson v. Perales, 402 U.S. 389, 410 (1971), this Honorable Court notes that the

fundamental principles of due process embody "fundamental fairness":

> The matter comes down to the question of the procedure's integrity and fundamental fairness. We see nothing that works in derogation of that integrity and of that fairness in the admission of consultants' reports, subject as they are to being material and to the use of the subpoena and consequent cross-examination.

Id..

However, in the matter sub judice, the element of fundamental fairness is absent.

The Workers' Compensation Judge's ex parte conversation, which formed the basis of a finding of fact denying Employer's petition, occurred without notice to Employer, thereby denying Employer the constitutionally guaranteed rights of notice and opportunity to defend and the right to confront and cross-examine witnesses.

In rejecting Employer's constitutional challenge, the Commonwealth Court held that Employer did not establish reversible error as the independent "investigation" conducted by the Workers' Compensation Judge revealed information consistent with the deposition testimony of Scott Livingstone, which was offered as evidence by Employer.

Employer submits, however, that the underlying premise of the Commonwealth Court is flawed, i.e., that the finding of the Workers' Compensation Judge accurately reported all information obtained by the Workers' Compensation Judge during his private "investigation."

However, due to the manner in which the "investigation" was conducted, without notice to either party and opportunity to defend, no record was made of said "investigation." Therefore, it is impossible to verify if the Workers' Compensation Judge's finding is an accurate recitation of all information elicited by the Workers' Compensation Judge during his

private "investigation." It is also impossible to determine if the Workers' Compensation Judge relied upon information not recited in his finding of fact, or ignored information contrary to his findings, in rendering his decision.

The manner in which the Workers' Compensation Judge conducted the "investigation" sub judice is sadly reminiscent of the procedure before the Star Chamber, the royal English Court abolished in 1641 because of public outrage. The Star Chamber was "notorious for its secret sessions without jury, and for its harsh and arbitrary judgments and its use of torture to force confessions." New World Dictionary of the American Language, 2nd Ed. (The World Publishing Company, 1978).

While the Workers' Compensation Judge obviously did not use "torture" or force the "confession" of Today's Temporary, the Workers' Compensation Judge did hold a "secret session," and acting as an impermissible witness, rendered a decision which violated Employer's constitutionally protected due process rights.

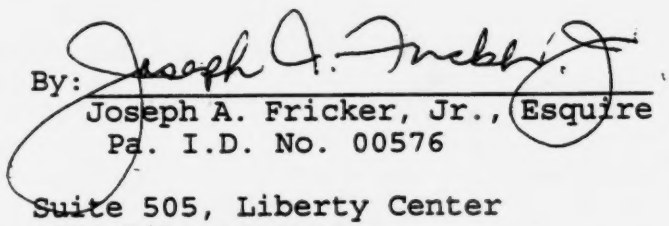
Finally, if the conduct of the Workers' Compensation Judge is deemed to be sanctioned by the Pennsylvania Workers' Compensation Act, the statute itself must be found to deprive Employer of its constitutional right to due process of law.

Therefore, based upon this Honorable Court's long-standing tradition of protecting the constitutional rights of those subject to its jurisdiction, Employer respectfully requests that this Honorable Court issue a Writ of Certiorari to the Supreme Court of Pennsylvania.

XI. CONCLUSION

Wherefore, Employer respectfully requests that this Honorable Court issue a Writ of Certiorari to the Pennsylvania Supreme Court and hold that the Workers' Compensation Judge violated Employer's due process rights guaranteed by the Amendment XIV, Section 1 to the United States Constitution.

Respectfully submitted,
FRICKER & ASSOCIATES



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July 11, 2002

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COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
BUREAU OF WORKERS' COMPENSATION
724-832-5310

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DECISION RENDERED COVER LETTER

Bureau Claim Number: 466346
Insurer Claim Number:
Petitions:
Pet-To Modify Compensation
Pet-To Terminate Compensation Benefits
Judge: John Cassidy
115 West Otterman Street
Greensburg, PA 15601

MILTON MARKOVICH
RD #1, BOX 168
IRWIN, PA 15642

RICHARD S. BELKIN, ESQ.
EDGAR SNYDER & ASSOCIATES
707 GRANT STREET
GULF TOWER, 16TH FLOOR
PITTSBURGH, PA 15219
Vs
WESTINGHOUSE ELECTRIC CORP
GATEWAY CENTER
11 STANWIX STREET
PITTSBURGH, PA 15222

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GATES MCDONALD AND COMPANY
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PITTSBURGH, PA 15220

COMMONWEALTH OF PENNSYLVANIA
BWC LEGAL DIVISION
1171 S. CAMERON STREET
ROOM 327
HARRISBURG, PA 17104-2501

The attached Decision of the Judge is final unless an appeal is taken to the Workers' Compensation Appeal Board as provided by law. If you do not agree with this Decision, an appeal must be filed with the Workers' Compensation Appeal Board within 20 days of the date of this notice.
Forms for an appeal may be obtained from the Workers' Compensation Appeal Board,
Capital Associates Building
901 North Seventh Street
Third Floor South
Harrisburg, PA 17102

Employee Counsel Witnesses & Exhibits:
Milton Markovich
Milton Markovich
1. Michael E. Wald, M.D., 2/1/95 deposition
2. Richard S. Belkin, Esq., 1/21/97 correspondence to insurer counsel, with attachments
3. Richard S. Belkin, Esq., 8/19/94 correspondence to insurer counsel, with attachments
4. Richard S. Belkin, Esq., 8/11/94 correspondence to insurer counsel, with attachments
5. Michael Wald, M.D., 2/17/98 deposition
6. Bill of Costs

Insurer Counsel Witnesses & Exhibits:
Kirk Anthony Williams
A. Gregory J. Fino, Esq., 4/8/97 report, with attachments
B. Gregory J. Fino, M.D., 9/15/97 deposition

C. Occupational Resource Specialists, Inc., vocational packet
D. Four Star Investigations, summary of surveillance
E. Scott Livingstone, 7/14/98 deposition
F. Georgette Gerben, 7/14/98 deposition
G. Georgette Gerben, 8/2/99 deposition

Judge Witnesses & Exhibits:

1. 3/30/93 decision of WCJ (Referee) Kenney
2. 7/31/96 decision of WCJ Kenney

A Hearing Witnesses & Exhibits:

02 August 14, 1997; Hearing Held; Patricia Shutty; Transcript Received
04 May 21, 1998; Hearing Held; Patricia Shutty; Transcript Received

REASSIGNED Witnesses & Exhibits:

ORIG ASSIGNED-5/1/97-MODIFY
ORIG ASSIGNED - 11/21/97 - TERMINATE

Hearings:

12/14/99	10:00:00	Held
11/12/99	09:00:00	Postponed by Employee Counsel
8/23/99	09:00:00	Held
5/24/99	09:30:00	Held
12/8/98	00:00:00	Held
1/27/98	00:00:00	Held
5/13/97	00:00:00	Held

Milton Markovich
Vs
Westinghouse Electric Corporation
Claim #466346
Modification Petition
Termination Petition

FINDINGS OF FACT

1. On April 15, 1997 the Bureau received a Termination Petition filed by the defendant, Westinghouse Electric Corporation and its insurance carrier, Gates McDonald and Company, alleging that the claimant, Milton Markovich, has recovered from his work related injury of July 3, 1991 and that his benefits should be terminated as his disability has ceased as per an Affidavit of Dr. Gregory Fino. The defendant did request a Supersedeas pursuant to Section 413(A.2) of the Act. The Physician's Affidavit of Recovery accompanies the defendant's Termination Petition.
2. The Termination Petition was assigned to Judge John F. Kenney and all respective parties on May 7, 1997.
3. The defendant's request for Supersedeas was denied by an Interlocutory Order circulated on May 28, 1997. The defendant and/or its insurance carrier were to deduct twenty (20) percent of the compensation paid to the claimant and forward said monies to Richard S. Belkin, Esq., claimant's counsel.
4. On November 3, 1997 the Bureau received Modification Petition filed by the defendant, Westinghouse Electric Corporation and its insurance carrier, Gates McDonald and Company, alleging that the claimant, Milton Markovich, should have his benefits modified as he failed or refused to attend scheduled interviews at Today's Temporary on the following dates: September 12, 1997; September 16, 1997 and September 25, 1997. The defendant also

requested a Supersedeas be granted in this case pursuant to Section 413(A.2) of the Act.

5. By Interlocutory Order circulated January 28, 1998 Judge Kenney denied the defendant's request for Supersedeas on the Modification Petition and ordered that twenty (20) percent of the claimant's benefits be directed to claimant's counsel as attorney's fees.
6. Both the Modification and Termination Petitions were heard by Judge Bloom, Judge Guyton, and eventually by myself. Judge Kenney retired on February 26, 1999 and upon his retirement the Modification and Termination Petitions were assigned to this Workers' Compensation Judge for decision.
7. In rendering a decision on the Termination request by the defendant, this Judge took into consideration the evidence submitted by both parties which consists of the report of Dr. Fino of April 8, 1997 with attached medical diagnostic studies; the deposition testimony of Dr. Gregory J. Fino taken on September 15, 1997; the deposition testimony of Dr. Michael E. Wald taken on February 1, 1995; the deposition testimony of Dr. Michael E. Wald taken on February 17, 1998 and testimony from the claimant. Also, this Judge reviewed the decision of Judge Kenney rendered on March 30, 1993.
8. This Workers' Compensation Judge finds that the claimant was employed by the defendant based on the credible testimony of the claimant and the March 30, 1993 decision circulated by Judge Kenney, this Workers' Compensation Judge finds that the claimant suffered an asthmatic work related injury as a result of exposure to Trichlorethylene at work. The Trichlorethylene is known to be a bronchial sensitizer and this created the sensitivity in the claimant's bronchial

tubes that resulted in his asthmatic condition. Dr. Wald believed that the claimant would not further be able to be involved in his pre-injury job as he would again be put to exposure of the Trichlorethylene which would aggravate or exacerbate his asthmatic condition.

9. The defendant had the claimant examined by Dr. Gregory J. Fino on February 20, 1997. Dr. Fino testified by way of deposition that he had examined the claimant and had taken a history which included the claimant having used Preventile inhaler, Azmacort, Theodor 300mg., and Prednizone as needed. The claimant also offered a history of being a 1 1/2 to 2 pack of cigarette smoker per day from approximately 1960 to 1980. The claimant also informed the doctor that his job duty was a federal welder beginning in 1970 wherein he welded in areas that included a heat bath containing Trichlorethylene which is a substance used to degrease various parts. The claimant stated he worked in that area until 1974 where he would have shortness of breath when working in that area. The claimant's history continues to indicate that he had used Trichlorethylene on welded parts by spraying and wiping the parts in confined areas. The claimant informed the doctor he was laid off from his position in 1985 and that his asthmatic problems still bothers him.

Dr. Fino goes on to testify that he had reviewed a quantity of chest x-rays of the claimant along with an x-ray that he performed on the date of his examination. Dr. Fino testifies that he had numerous medical reports and physical capacity assessment forms plus deposition transcripts of other physicians relating to the claimant's work related injury.

Dr. Fino diagnoses the claimant with diffuse wheezing secondary to hyperactive

airway disease from previous smoking and a pre-deposition to asthma (non-occupational).

Dr. Fino goes on to state that Trichlorethylene, a compound which the claimant was exposed to, is not a cause of occupational asthma as reported in any medical literature. Dr. Fino does testify that there is no doubt in his mind that the claimant had wheezing based on his examination. Dr. Fino states that this wheezing is consistent with an asthmatic bronchitis which is secondary to his previous cigarette smoking and a tendency toward asthma. All in all, Dr. Fino believes that the claimant has a hyperactive airway condition.

Dr. Fino goes on to testify that if he assumes that the claimant had a worsening of his wheezing secondary to his exposure during his years of employment, he states within a reasonable degree of medical certainty that those exposures would not now be causing any permanent impairment. Dr. Fino relates the claimant's present condition to obesity.

Dr. Fino states that occasionally acquired asthmas generally goes away once the inciting agent is no longer in the claimant's environment. Dr. Fino states that although he does not believe that this man has an occupational asthma, the fact exists that he is no longer exposed to the chemicals which he described at work that he believes caused his asthma. Dr. Fino is therefore of the opinion that the claimant is not disabled by asthma as a result of Trichlorethylene exposure while in the course and scope of his employment at Westinghouse.

Dr. Fino believes that the claimant is able to perform his pre-injury employment. Although the claimant suffers from asthma, Dr. Fino also believes that the claimant would be able to perform any type of

employment that would not aggravate or exacerbate that situation.

10. In support of the claimant's position, counsel submitted the deposition testimony of Dr. Michael E. Wald. Dr. Wald testified that he has had the opportunity to treat the claimant on several occasions starting from 1994. Dr. Wald states that he has not seen the claimant from 1994 until early March of 1997 when he began to specifically take over the claimant's treatment. Dr. Wald states that he treats the claimant for bronchioplastic disease or asthma. Dr. Wald placed the claimant on metered doses of inhaled medications for maintenance as well as rescue to use at the time of any acute exacerbation of the claimant's symptoms. Dr. Wald states that the claimant uses Serevent and Flovent on a regular basis taking inhalations of both every twelve hours. Dr. Wald believes that the claimant's condition since March of 1997 through November of 1997 has improved. The claimant was having occasional flare-ups where he would be aware of wheezing but was able to manage himself by the use of the rescue drug Preventile. Dr. Wald goes on to testify that from March of 1997 through November 7, 1997 the claimant had lost approximately 30 pounds. Dr. Wald testified in May of 1997 he filled out a prescription slip for the claimant indicating that it was his opinion that the claimant is not able to return to work as a welder for Westinghouse.

Dr. Wald goes on to testify that it would be unusual for a person to recover from the asthmatic condition that the claimant suffers from. Dr. Wald states he would not totally disable the claimant because of the minimal airway obstruction but believes the claimant could perform light duty work.

Dr. Wald is of the opinion that the claimant's exposure to Trichlorethylene is the factor that sensitizes the claimant's bronchial tubes which now can bring about a variety of things that cause the claimant's asthma to be exacerbated. Dr. Wald was of the opinion that the claimant's exposure to Trichlorethylene was the cause of his work related asthmatic condition and he opined this in his previous deposition of February 5, 1995.

Dr. Wald testifies that the claimant would still be restricted from perform his pre-injury job duties or to be exposed to any irritants which would aggravate or exacerbate the claimant's asthmatic condition.

11. This Workers' Compensation Judge finds that the deposition testimony of Dr. Fino is contrary to the decision and opinion of Judge Kenney rendered on March 30, 1993. This Workers' Compensation Judge further believes that Dr. Fino's testimony is neither credible nor persuasive based on the fact that Dr. Fino['s opinion that the claimant's condition is caused by obesity was determined in late February or early March of 1997. From the time of Dr. Fino's examination to the time of Dr. Wald's examination the claimant had lost approximately thirty pounds of weight but still had the same readings on examination in his lung capacity when Dr. Wald performed the readings in November. Therefore, the cause of obesity is disregarded by this Judge.

12. This Workers' Compensation Judge finds the deposition testimony of Dr. Wald to be credible and persuasive that the claimant still suffers an employment induced asthmatic condition. This Workers' Compensation Judge accepts Dr. Wald's opinion as it was accepted by Judge Kenney in a prior decision and that Dr. Wald also

had the opportunity to examine the claimant on numerous occasions and has more of a comparative reasoning when rendering his opinion.

13. This Workers' Compensation Judge finds that the claimant is able to perform light duty work but is not able to return to his pre-injury employment with the defendant as a welder/fitter.

14. In rendering this decision in the request of the defendant's Modification Petition, this Workers' Compensation Judge had the opportunity to review the following evidence: the deposition testimony of Georgette Gerben with attached job offers, the deposition testimony of Scott Livingstone, and the testimony of the claimant.
This Workers' Compensation Judge also had the opportunity to talk to a supervisor at Today's Temporary now called Today's Staffing in an investigative situation to determine what type of employer Today's Temporary was.

15. In support of the defendant's Modification Petition the deposition testimony of Georgette Gerben was taken on two occasions. Ms. Gerben testifies that she is a vocational job rehabilitation specialist. Ms. Gerben testifies that she has not had the opportunity to have a personal interview with the claimant because of factors concerning the claimant's attorney and the attorney's unwillingness to allow the claimant to be interviewed. Ms. Gerben states that sample form applications and interview forms were sent to the claimant which she eventually did receive back from the claimant. She states these are necessary when considering an individual for employment and that they are used as guidelines. Ms. Gerben testified that she had offered particular jobs to the claimant based on medium duty restrictions

from Dr. Fino. Ms. Gerben goes on to testify that the claimant was offered employment opportunities where he had applied for the jobs and was unsuccessful in receiving a job offer and jobs where he had reported earlier than the times requested for the filling out of job applications. Ms. Gerben does testify that out of the twelve positions offered to the claimant, the claimant did not apply for a position at Monroeville Chrysler Plymouth, nor did he apply at Today's Temporary Service when requested by correspondence on three different occasions.

Ms. Gerben testifies that on the job offers to the claimant where she indicates a specific time he is to report to fill out an application is so that she would be able to be there and observe the claimant and to have a better understanding of what happened during the application process. She believes that this would aid her in being able to testify in Workers' Compensation cases where the employer then would not have to be bothered to come in to testify as to the claimant's appearance or demeanor during the course of an interview.

16. In further support of the Modification Petition counsel for the defendant submitted the deposition testimony of Scott Livingstone. Mr. Livingstone is employed with Today's Temporary as an operations and personnel manager. At the time of his deposition Mr. Livingstone was working as a territorial manager for Today's Temporary. Mr. Livingstone states that various administration tasks that he performs involves recruiting, interviewing and processing of applicants. Mr. Livingstone testified to the three dates the claimant was to present himself for an interview. September 12, September 16, and September 25, 1997. Mr. Livingstone

testifies that an applicant might possibly be applying for what was listed as a clerical position. Mr. Livingstone states that this information was obtained when contacted by Ms. Gerben where she indicated what the claimant's capabilities would be. Mr. Livingstone goes on to testify that when somebody makes an appointment to register with our temporary service, we have a number of steps that we take to register that person. The first step being we have them fill out a skills profile sheet that identifies certain skills that they may or may not have. Mr. Livingstone states that from there the person is put on a computer rather than filling out a handwritten hard copy application. The person then would be set up for testing to evaluate their skills, be they clerical, software skills, a number of different areas that we can test them on based on what they have put on the skill sheet and from our conversations prior to testing them. The parties are then moved to an interview where thy are oriented on Today's Temporary and what they might be able to provide for them. Mr. Livingstone goes on to testify that it is not until the person has gone through an entire process and they know their backgrounds and skills that they might be able to help them. Mr. Livingstone goes on to testify that he would not be able to supply job duties or qualifications on any particular job because he had not had the opportunity to meet Mr. Markovich.

17. The positions the claimant was requested to apply for include the following:
    A. Riverview Cafe, claimant applied.
    B. Manhattan Bagel, claimant applied.
    C. Letterie Discount Pharmacy, claimant applied, position filled.
    D. Connelly Inn, claimant applied.
    E. A & L Motors, claimant applied.

F. Monroeville Chrysler, claimant applied after returning from vacation, position was filled and not available even as of the date of the claimant's requested job application time.
G. Econo Lodge, Greensburg, claimant applied.
H. Harley Hotel of Pittsburgh, claimant applied.
I. Comfort Inn of Greensburg, claimant applied.
J. Denny's Restaurant, claimant applied.
K. Dante's Fashions, claimant applied.
L. Today's Temporary, claimant did not apply as there was no specific job offer made to the claimant nor any indication of the hourly rate but was just listed as a general category.

18. The claimant had the opportunity to testify before this Workers' Compensation Judge specifically in rebuttal to the testimony of Georgette Gerben. The claimant informed this Judge of his applications for jobs specifically the one at the Monroeville Chrysler Plymouth where he had applied for the job after making arrangements to go back to apply on two occasions. The claimant was informed that the job was filled on July 3, 1997. The claimant also went on to testify about the position at the Econo Lodge in Greensburg where he had applied early and had asked for an interview and was told that the job was filled the day before he was scheduled for application. The claimant went on to testify that on August 4, 1997 he applied at the Harley Hotel in Pittsburgh which was a day earlier than requested because when he called the place of employment he was informed that the person who he was to apply to would be on vacation August 5. The claimant testified to the Comfort Inn in Greensburg where he applied on the date requested but was a half hour earlier than requested and was informed that the job

was already filled. The claimant testified that he had the individual at the desk sign his referral letter to indicate that he was there. The claimant testified that the job at Denny's in Monroeville was also filled prior to his application of August 16, 1997 which was four days before he was requested by the vocational person to apply. The claimant then testifies that he applied at Dante's Fashion on August 22, 1997 because during the week of August 25 when he was requested to interview, Dante's Fashion was closed for vacation.

The claimant went on to testify that he had no idea that the time requested for the filling out of the applications was because Ms. Gerben wanted to be in attendance during this time. The claimant states that there were numerous jobs that he had gone to, to apply for the jobs submitted to him where they were already filled and that the parties were not taking applications. The claimant went on to testify that during the time of the filling out of his applications, he always wore a jacket and tie.

The claimant testified that he never filled out an application for Today's Temporary as he felt that this was just another process of him being handed over to another third party administrator. The claimant testified that the communications for Today's Temporary never specified any specific jobs but only requested for him to present himself for an interview.

19. As the request for modification by the defendant employer is for the position of Today's Temporary Service, this Judge takes judicial notice that the correspondence submitted as part of exhibits by the defendants does not indicate a specific job or rate of pay to which the claimant is applying for employment. In my conversation with

Today's Temporary which should be noted that is now called Today's Staffing, this Judge found that there was no employment in Today's Temporary Service for the claimant but rather, they hold a list of individuals where they're able to offer to different employees in and around the city of Pittsburgh, Pennsylvania. This Judge goes on to note that the individual testifying on behalf of Temporary Service which is Scott Livingstone, is not certified as a rehabilitation consultant or specialist. Therefore, this Workers' Compensation Judge finds that Today's Temporary Service is not gainful employment that the claimant had an opportunity to obtain while being vocationalized through Occupational Resource Specialists, Inc., the employer for Georgette Gerben.

20. This Workers' Compensation Judge finds, based on the credible testimony of the claimant and also based on the information supplied by Ms. Gerben, that the claimant had applied for 11 of the 12 positions offered to him that were prospective employers through a rehabilitation process. Albeit the claimant may not have applied at the times requested by Ms. Gerben, there is no indication in the record or testimony from an employer that the application time created any problem with the employer. This Judge notes that the only problem would have been that the vocational specialist would not have been there to hear any of the transaction between the job applicant, being the claimant, and the prospective employer. This Judge takes judicial notice that there were never interviews scheduled where the claimant had a direct opportunity for employment.

21. This Workers' Compensation Judge does not accept the testimony of Georgette Gerben, an occupational specialist, to be

persuasive and supporting the defendant's position that a job offer was made to the claimant under the rules in Kachinsky.

22. Based on the record as a whole dealing with the Modification Petition, this Workers' Compensation Judge finds that the claimant had presented himself when requested by the vocational specialist to submit job applications for numerous employers and that if Today Temporary was an employer rather than an employer provider, this Judge believes that the claimant would have applied also for that job based on his response to the numerous other jobs offered to him by Ms. Gerben.
23. Claimant's counsel in the course of representing the claimant in defense of both the Termination and Modification Petitions, incurred Bill of Costs in the amount of $1,842.12. This Workers' Compensation Judge finds those costs to be reasonable.
24. Based on the testimony of Dr. Wald that this Workers' Compensation Judge found to be credible and persuasive, this Judge finds that prescriptions filled by the Edwards Pharmacy, Inc. for the claimant's prescription drugs are the responsibility of the defendant/carrier and that said carrier is to reimburse the claimant for out of pocket expenses for those costs.

CONCLUSIONS OF LAW

1. All parties are governed by the provisions of the Pennsylvania Workers' Compensation Act, as amended.
2. The defendant failed to sustain their burden of proof that the claimant no longer suffers any residual disabilities as a result of his July 3, 1991 work related injury and that his benefits should cease and terminate based on the testimony of Dr. Fino.
3. The defendant failed to satisfy their burden of proof in the Modification Petition that the claimant failed or

refused to attend an interview at Today's Temporary which would result in employment for the claimant. It is noted that Today's Temporary had no jobs available to him nor was there an indication of a position or a rate of pay to which the claimant was applying.

4. This Workers' Compensation Judge finds that the claimant satisfied his burden that he had applied for positions which the defendant representative had instructed him to, with the exception of Today's Temporary as that was not an employer but rather a party that employs individual for other parties.
(Although not a Conclusion of Law, this Judge notes that the defendant, at the drop of a hat, has taken task to the claimant to have him apply for positions and the jobs at Temporary Service was just an attempt to find a pig in a poke.)
5. The defendant, and/or its insurance carrier, are liable for claimant's medical bills consistent with Section 306 of the Act.
6. The defendant and/or its insurance carrier, are liable for claimant's Bill of Costs pursuant to Section 440 of the Pennsylvania Workers' Compensation Act.
7. Attorney's fees are approved as reasonable.
8. Counsel for the defendant preserved objections on page 14 line 11 of the deposition of Scott Livingstone and this Judge sustains that objection to a question based on an incorrect fact.
9. The defendants also preserved objections of the deposition transcript of Georgette Gerben at Page 23, Lines 8-19, objections overruled; Page 28, Lines 13-21, objection overruled; Page 32, Lines 11-12, 16-24, objection overruled; Page 59, Lines 9-12, objection overruled; Page 66, Lines 4-9, 22-24, objections overruled; Page 66,

Lines 7-13 objection overruled; Page 68, Lines 18-20, objections overruled.

10. Claimant's counsel requested the preservation of objections to the deposition testimony of Georgette Gerben of July 14, 1998: Pages 13, 14, Lines 13, 24, 1, 12, sustained; Page 15, Lines 5-12, sustained; Page 18, Lines 12-14, sustained; Page 35, Lines 6, sustained; Page 38, Lines 13-19, sustained; Page 75, Lines 10-17, sustained.

For the deposition of August 2, 1999, objection preserved for Page 42, Lines 22 and 23, sustained; and Page 43, Lines 14 and 15, sustained.

ORDER

And Now, this 11th day of January, 2000, this Workers' Compensation Judge hereby directs and orders that the Termination and Modification Petitions filed by the defendant, Westinghouse Electric Corporation and its insurance carrier, Gates, McDonald and Company vs. the claimant, Milton Markovich, are hereby denied and dismissed.

The defendant, and/or its insurance carrier, shall reimburse claimant's counsel, Richard S. Belkin, Esq. for Bill of Costs in the amount of $1,842.12.

The defendant, and/or its insurance carrier, shall reimburse the claimant for out of pocket expenses for prescription drugs prescribed by Dr. Wald or the physicians that prescribed the inhalers or medications for the claimant's asthmatic condition. All bills submitted to this Judge are from Edwards Pharmacy, Inc., North Huntingdon, PA.

By previous Interlocutory Order, this Workers' Compensation Judge directed the claimant be reinstated to his full benefit rate of $336.00 per week based on his pre-injury average weekly wage of $507.60.

The defendant, and or its insurance carrier, shall continue to deduct

attorney's fees in the amount of twenty (20%) percent of the claimant's weekly compensation rate and send said monies directly to Richard S. Belkin, Esq., claimant's counsel.

The record is closed and all papers are returned to the Bureau.

s/John P. Cassidy
JOHN P. CASSIDY
WORKERS' COMPENSATION JUDGE
115 West Otterman Street
Greensburg, PA 15601

JPC:giv
DATE: 01/11/00

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
WORKERS' COMPENSATION APPEAL BOARD
901 N. 7TH STREET, 3RD FLOOR SOUTH
HARRISBURG, PA 17102-1412

Opinion Mailing Date: 12/14/00
A00-0292

MILTON MARKOVICH, Claimant
R D #1
BOX 168
IRWIN, PA 15642

WESTINGHOUSE ELEC CORPORATION, Defendant
GATEWAY CENTER
11 STANWIX STREET
BEDFORD, PA 15222
INSURANCE CARRIER

GATESMCDONALD
730 HOLIDAY DRIVE
FOSTER PLAZA VIII
PITTSBURGH, PA 15220
CLAIMANT COUNSEL

RICHARD S. BELKIN, ESQUIRE
707 GRANT STREET
GULF TOWER, 16TH FLOOR
PITTSBURGH, PA 15219
DEFENDANT COUNSEL

JOSEPH A. FRICKER, JR., ESQ
1001 LIBERTY AVENUE
STE. 505, LIBERTY CENTER
PITTSBURGH, PA 15222

COMM CHIEF COUNSEL
1171 S. CAMERON STREET
ROOM 327
HARRISBURG, PA 17104

Attached is a copy of an Opinion from the Workers' Compensation Appeal Board filed this date in the above-captioned case. An appeal to the Commonwealth Court of Pennsylvania may be

taken by any party aggrieved by the Board's decision, provided such appeal is taken within (30) days after the mailing date of the Board's decision. The Board has nothing to do with the filing or processing of further appeals to the Court. Further appeals may be filed in person or by mail (accompanied by U.S. Postal Services Form 3817) with the Prothonotary of the Commonwealth Court of Pennsylvania, Room 620 South Office Building, Harrisburg, Pennsylvania 17120.

Attachment

COMMONWEALTH OF PENNSYLVANIA
WORKERS' COMPENSATION APPEAL BOARD
HARRISBURG

A00-0292

MILTON MARKOVICH
R D #1
BOX 168
IRWIN, PA 15642

: APPEAL BY DEFENDANT
: FROM ORDER OF
: WC JUDGE CASSIDY

vs.

: S.S. # 186-34-8630
: PITTSBURGH/MAY, 2000

WESTINGHOUSE ELEC
CORPORATION
GATEWAY CENTER
11 STANWIX STREET
BEDFORD, PA 15222

AFFIRMED

GATESMCDONALD
730 HOLIDAY DRIVE
FOSTER PLAZA VIII
PITTSBURGH, PA 15220

: INSURANCE CARRIER

RICHARD S. BELKIN, ESQUIRE:
707 GRANT STREET
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PITTSBURGH, PA 15219

CLAIMANT'S COUNSEL

JOSEPH A. FRICKER, JR., ESQ:
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PITTSBURGH, PA 15222

DEFENDANT'S COUNSEL

COMM CHIEF COUNSEL
1171 S. CAMERON STREET
ROOM 327
HARRISBURG, PA 17104

OPINION

HOFFMAN, COMMISSIONER:

This matter is before the Workers' Compensation Appeal Board ("Board") on the Appeal of Defendant from the Decision and Order of the Workers' Compensation Judge ("WCJ") John P. Cassidy which denied the Defendant's Termination and Modification Petitions. For the reasons set forth below, the Decision of the WCJ is affirmed.

Review of the record indicates that Claimant, Milton Markovich, sustained an injury on July 31, 1991, while in the course and scope of his employment with Defendant, Westinghouse Electric Corporation. Pursuant to a Decision and Order of WCJ John F. Kenney circulated March 30, 1993, the Claimant was found to have developed occupational type asthma as a result of being exposed to trichlorethylene while in the course of his employment with Defendant from mid-1970 to December 31, 1985. The Defendant was directed to pay Claimant compensation at the rate of $336.00 per week. On April 15, 1997, Defendant filed a Petition to Terminate Compensation Benefits alleging that the Claimant had completely recovered form his work-related injury as of February 20, 1997. On November 3, 1997, the Defendant filed a Petition to Modify Compensation Benefits alleging that the Defendant referred the Claimant to appropriate light-duty employment but that the Claimant failed or refused to attend scheduled interviews. It does not appear from the record that the Claimant filed Answers to either of these Petitions.

Subsequent to hearings, receipt of evidence and review of the record, the WCJ circulated his Decision on January 12, 2002, which denied both the Termination and Modification Petitions. The appeal followed.

The Defendant sets forth 19 separate bases for its appeal. These are addressed below seriatum.

The Board's function is primarily appellate in nature. Bethenergy Mines, Inc. v. W.C.A.B. (Skirpan), 612 A.2d 434 (Pa. 1992). In cases where the Board has taken no additional testimony, the Board is required to accept the facts as found by the WCJ if they are supported by competent evidence. Bethenergy Mines, supra. The proper scope of inquiry is not whether, upon a review of all of the evidence, the Decision reached by a WCJ appears to have been the most reasonable and probable one that could have been reached. Rather, review is limited to a determination of whether the record contains substantial evidence which supports the WCJ's findings. Bethenergy Mines, supra. Substantial evidence is such relevant evidence with a reasonable mind might accept as adequate to support a finding. York Terrance/Beverly Enterprises v. W.C.A.B., 591 A.2d 762 (Pa. Cmwlth. 1992).

In workers' compensation proceedings, it is the function of the WCJ to weigh the evidence and resolve conflicting testimony. Alpo Petfoods, Inc. v. W.C.A.B. (Neff), 663 A.2d 293 (Pa. Cmwlth. 1995); Buczynski v. W.C.A.B. (Richardson-Vicks, Inc.), 576 A.2d 421 (Pa. Cmwlth. 1990). The WCJ is free to accept or reject, in whole or in part, the testimony of any witness, including medical witnesses. Greenwich Collieries v. W.C.A.B. (Buck), 664 A.2d 703 (Pa. Cmwlth. 1995).

The WCJ dismissed the Defendant's Termination Petition, relying on the testimony of Claimant's medical witness, Dr. Michael E. Wald, that the Claimant had not fully recovered from his work-related asthma as of the date of his deposition, February 17, 1998. The WCJ rejected the testimony of Defendant's medical witness, Dr. Gregory J. Fino, as being neither credible nor persuasive that the Claimant's condition (wheezing) is secondary to hyperactive airway disease caused by the Claimant's previous history of smoking and a pre-disposition to non-occupational asthma.

The WCJ denied the Defendant's Modification Petition on the basis that the correspondence to the Claimant referring him for the position at Today's Temporary Service did not indicate a specific job or advise the Claimant as to the physical or vocational requirements of that job.

Having reviewed the evidence and the testimony in this matter, this Board concludes that there is substantial, competent evidence to support the conclusion of the WCJ that Defendant was not entitled to either a termination or modification of benefits.

As indicated above, in concluding that the Defendant was not entitled to a termination of benefits, the WCJ made certain credibility determinations. The WCJ found the testimony of Dr. Wald to be more credible and persuasive than that of Dr. Fino. Additionally, as to the issue of ongoing disability, the WCJ found the testimony of the Claimant to be both credible and persuasive. The WCJ acted well within his discretion in making these credibility determinations. This Board is not empowered to revisit those credibility determinations. Greenwich Collieries, supra.

As to the denial of the Defendant's Modification Petition, the WCJ concluded that the Defendant never referred the Claimant to a then-available position within the Claimant's physical and vocational capabilities. The testimony of Defendant's witness, Georgette Gerben, and other evidence of record, demonstrate that Defendant filed to provide even a general description of the allege available position at Today's Temporary Services.

An employer who seeks to modify a claimant's benefits on the basis that the claimant has recovered some or all ability must first produce medical evidence of a change in condition. The employer must also produce evidence of referrals to then-open jobs, which fit into the occupational categories for which the claimant has been given medical clearance.

The burden then shifts to the claimant to demonstrate that the claimant acted in good faith in following through on the job referrals. Kachinski v. W.C.A.B. (Vepco Constr. Co.), 516 Pa. 240, 532 A.2d 374 (1987). The job referral must provide the claimant with a general job classification or a description of the job duties, and indicate that the job is within the classification for which claimant has received medical clearance. School Dist. of Philadelphia v. W.C.A.B. (Stutts), 603 A.2d 682 (Pa. Cmwlth. 1992). Inasmuch as the job referral to Today's Temporary Services did not contain even a general description of the alleged job duties, the Defendant failed the second prong of the Kachinski test and is, therefore, not entitled to a modification of benefits based on this particular referral.

In and overabundance of causation, the Board will address each of the Defendant's bases of appeal:

1. The WCJ failed to make essential Findings of Fact with respect to the testimony of Kirk Anthony Williams, private investigator with Four Star Investigations, as to the videotape which depicted Claimant engaging in roofing activities.

The Defendant is correct to the extent that the WCJ did not make Findings of Fact with respect to the videotape. It is not necessary, however, for the WCJ to review every item of evidence of record in order to satisfy the reasoned-decision requirements pursuant to Section 422(a) of the Act. The WCJ need only explain the rationale for his decision so as to provide for meaningful and effective judicial review. Sherrod v. W.C.A.B. (Thoroughgood, Inc.), 666 A.2d 383 (Pa. Cmwlth. 1995). Even in the absence of Findings of Fact regarding the videotape, this Board had no difficulty in discerning the evidence relied upon by the WCJ or his reasoning s to his Conclusions of Law.

2. The WCJ failed to make essential Findings of Fact as to whether the jobs offered

to the Claimant were within his physical capabilities.

The WCJ was not required to make Findings of Fact as to the ten other jobs allegedly referred to the Claimant. The testimony of Defendant's witness, Georgette Gerben, establishes that the Claimant applied for all but two positions referred and was not offered a job as a result of any of the referrals. Inasmuch as the WCJ deemed those jobs to be unavailable because they were not open to the Claimant, there was no reason for the WCJ to make Findings of Fact as to whether those jobs were within the physical capabilities of the Claimant.

3. The WCJ failed to make essential Findings of Fact as to whether the clerical positions at Today's Temporary were within Claimant's physical capabilities.

Given the conclusion of the WCJ that the Defendant never properly referred the Claimant to a then-available position at Today's Temporary, this argument is deemed moot and will not be addressed.

4. The WCJ erred in concluding that Today's Temporary was not an employer.

Again, given the conclusions of the WCJ that the Defendant never properly referred the Claimant to a then-available position at Today's Temporary, this argument is deemed moot.

5. The WCJ erred in basing his findings and decision on facts not of record as a result of the WCJ's "investigation" without notice to the parties or the opportunity to cross-examine the sources of his information or the opportunity to be heard, constituting a denial of due process of law.

Again, given the conclusion of the WCJ that the Defendant never properly referred the Claimant to a then-available position at Today's Temporary, this argument is also moot. Furthermore, the Act give the WCJ broad

authority to investigate on his own motion facts set forth in any petition. The investigation can be conducted either before, during or after any hearing. See, Sections 418, 420, 436 and 437 of the Act, 77 P.S. §§833, 831, 992 and 993.

6. The WCJ erred in concluding that employment by a temporary employment service cannot be a valid job referral.

As the WCJ concluded that the Defendant never properly referred the Claimant to a then-available position at Today's Temporary, there is no need to address this finding of the WCJ.

7. The WCJ erred in concluding that a temporary employment service cannot be an employer.

For the reasons set forth above, the Board will not address this argument.

8. The WCJ erred in concluding that no rate of pay was established with respect to employment by or through Today's Temporary.

For the reasons set forth above, this argument is deemed to be moot.

9. The WCJ erred in concluding that a time set for an application for employment must be a scheduled interview or the Claimant may ignore the employment.

The WCJ never stated that a Claimant may ignore a referral where there is no interview scheduled. The WCJ stated at Finding of Fact No. 20:

> . . . Albeit the claimant may not have applied at the times requested by Ms. Gerben, there is no indication in the record or testimony from an employer that the application time created any problem with the employer. This Judge notes that the only problem would have been that the vocational specialist would not have been there to hear any of the transaction between the job applicant, being the claimant, and the

prospective employer. This Judge takes judicial notice that there were never interviews scheduled where the claimant had a direct opportunity for employment.

We find no error in the conclusion of the WCJ that the Claimant did not sabotage the application process by applying at a time other than that specifically directed by the vocational specialist. We also note, parenthetically, that the WCJ rejected the testimony of the occupational specialist as being neither credible nor persuasive at it pertained to the Claimant's alleged bad faith in following through on the job referrals.

10. The WCJ erred in failing to make essential Findings of Fact with respect to the testimony of Ms. Gerben as to the purposes of her presence at the time of applications and interviews.

For the reasons set forth above, the WCJ was not required to make "essential" Findings of Fact with respect to the testimony of Ms. Gerben. The Findings of Fact which the WCJ did make regarding the testimony of Ms. Gerben are sufficient to satisfy the requirements of a reasoned decision.

11. The WCJ erred in failing to consider Claimant's refusal of an expert interview to determine whether he complied with this Board's decision in Alvin Lewis v. City of Harrisburg, 12 PAWCLR 1107 (W.C.A.B. 1997), especially as to the vocational expert's observation of his dress, demeanor, and job-seeking skills.

The WCJ did not fail to consider whether or not the Claimant's refusal of an expert interview constituted bad faith on the part of the Claimant. The WCJ stated at Finding of Fact No. 15, ". . . Ms. Gerben testifies that she has not had the opportunity to have a personal interview with the Claimant because of factors concerning the Claimant's attorney and

the attorney's unwillingness to allow the Claimant to be interviewed. Ms. Gerben states that sample form applications and interview forms were sent to the Claimant which she eventually did receive back from the Claimant." (Finding of Fact No. 15). It is apparent to this Board on the basis of the Decision taken as a whole, that the WCJ did not find the refusal of the Claimant to be interviewed to constitute bad faith. Even more importantly, however, inasmuch as the WCJ concluded that the Defendant never properly referred the Claimant to a then-available position, it was not necessary that he specifically address the issue of bad faith. As indicated above, the burden only shifts to the claimant where the defendant has successfully produced evidence of a change in the medical condition and evidence of referrals to then-open jobs. Kachinski, supra. We find no error on the part of the WCJ in failing to make specific Findings of Fact regarding the Claimant's refusal of an expert interview.

12. The WCJ erred in concluding that Scott Livingstone was required to be "certified as a rehabilitation consultant or specialist" to either fund (sic.) or offer a job to Claimant.

This is, again, a moot argument given the finding of the WCJ that the Claimant was never properly referred to a then-available position at Today's Temporary.

13. The WCJ erred in concluding that, if the failure of the Claimant to apply or interview at the time set by the vocational expert is "not a problem for the employer," the Claimant is excused from appearing at the appointed time.

For the reasons set forth above, the WCJ did not err in concluding that the Claimant did not evidence bad faith by applying for the referred position at a time other than that

specifically specified by the vocational specialist.

14. The WCJ erred in concluding that an application, with the assistance of a vocational expert, cannot become an interview.

The Board will not address this argument. In the overall context of the WCJ's Decision and Order, this conclusion is of no consequence.

15. The WCJ erred in failing to find that Claimant acted in bad faith in apply for positions at dates and times different than those requested in the letter from the vocational counselor, at variance with this Honorable Board's decision in Alvin Lewis v. City of Harrisburg, 12 PAWCLR 1107 (W.C.A.B. 1997).

For the reasons set forth above, the WCJ did not err in failing to find that the Claimant acted in bad faith in applying for positions at dates and times other than those specified by the occupational specialist. Furthermore, no actual interviews for specific employment were ever scheduled.

16. The WCJ erred in failing to modify Claimant's workers' compensation benefits based upon the uncontradicted evidence that Claimant failed to attend three separate interviews with Today's Temporary.

For the reasons set forth above, this argument is also deemed to be moot and will not be addressed.

17. The WCJ acted improperly in initiating *ex parte* communication with Today's Temporary, a potential employer in the present litigation, in an "investigative situation" without notice to Defendant in a violation of Defendant's procedural due process rights.

For the reasons set forth above, this Board finds no error on the part of the WCJ in

conducting an investigation regarding Today's Temporary.

18. The WCJ erred in incorporating his Interim/Interlocutory Order dated January 26, 2000, in separate proceedings based upon Claimant's Challenge of the Notice of Modification of 9/20/99, ordering the reinstatement of Claimant's workers' compensation benefits, said Order currently on appeal before this Honorable Board.

The WCJ did not "incorporate" his Interim/Interlocutory Order of January 26, 1998, as part of his Decision and Order of January 12, 2000. The WCJ merely referenced the Interlocutory Order. Furthermore, the WCJ did not improperly subsume the prior Interlocutory Order into the Decision, thereby making it a final order as alleged by the Defendant. The Challenge Petition remains pending before the WCJ. Thus, the Interlocutory Order remains in effect. Moreover, any due process rights are protected by the Supersedeas Fund should the final order of the WCJ on the Challenge Petition differ from the Interlocutory Order.

19. In collaterally setting aside the Notice of Modification dated 9/20/99, which is the subject of separate proceedings on Claimant's Challenge of same.

Our review of the Decision and Order of the WCJ indicates that, contrary to the Defendant's assertion, the WCJ did not "collaterally" set aside the Notice of Modification dated September 20, 1999. Proceedings are still pending in that regard. The Defendant is in error in its interpretation of the Decision and Order of the WCJ in this regard.

In summary, our independent review of the record reveals that there is substantial competent evidence to support the findings and conclusions of the WCJ. As a result, the

decision will not be disturbed on appeal. Universal Cyclops Steel Corporation v. W.C.A.B. (Krawczynski), 305 A.2d 757 (Pa. Cmwlth. 1973).

Accordingly, we:

ORDER

The Decision and Order of the Workers' Compensation Judge John P. Cassidy circulated January 12, 2000, is **AFFIRMED** in its entirely.

BY THE BOARD:

s/Herbert W. Hoffman
HOFFMAN, COMMISSIONER

CONCURRED IN BY:

DEC 14 2000

s/Robert T. McIntyre
COMMISSIONER

s/Joseph P. Santone
COMMISSIONER

s/Gail O'Neill
COMMISSIONER

s/William J. Atkinson
COMMISSIONER

s/Harold Fergus
COMMISSIONER

s/Delores Wilson
COMMISSIONER

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Westinghouse Electric Corporation, Petitioner	:	
v.	:	
	:	No. 116 C.D. 2001
Workers' Compensation Appeal Board (Markovich), Respondent	:	Submitted: August 3, 2001

BEFORE: HONORABLE JAMES GARDNER COLINS, Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE SAMUEL L. RODGERS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: September 14, 2001

Westinghouse Electric Corporation/CBS (Employer) seeks review of the order of the Workers' Compensation Appeal Board (Board) that affirmed the decision of the Workers' Compensation Judge (WCJ) denying Employer's termination and modification petitions.

Milton Markovich (Claimant) worked as a welder with Employer from 1960, until he was laid off in 1985. In 1993, Claimant developed an asthmatic condition due to exposure to trichloroethylene solvent, a degreasing solvent, during the course of his employment. Claimant received workers' compensation benefits of $336.00 based on an average weekly wage of $507.00.

On April 11, 1997, Employer petitioned to terminate Claimant's benefits and alleged that his disability ceased as of February 20, 1997, based upon an affidavit of recovery completed by Gregory J. Fino, M.D. (Dr. Fino). After filing the termination petition, Employer initiated job referrals through a vocational

counselor. Claimant submitted applications to eleven jobs, none of which resulted in employment.

The vocational counselor set three appointments for interviews and testing at a temporary agency, Today's Temporary. When Claimant did not attend, on October 31, 1997, Employer petitioned to modify benefits. The modification petition and the termination petition were consolidated.

Claimant testified that he was a welder fitter. "I welded and fitted in an aisle where we built the big generator frames for Westinghouse." Notes of Testimony, May 13, 1997, (N.T.) at 6; Reproduced Record (R.R.) at 60a. The job involved lifting anywhere from five to two hundred pounds and climbing and carrying. N.T. at 7; R.R. at 62a. Claimant believed he was unable to do that work now because of his breathing. "If I get excited or exertion [sic] the breathing becomes harder, heat and humidity bothers me." N.T. at 3; R.R. at 57a. Claimant took medications for asthma as prescribed by a pulmonologist whom he saw on a regular basis. N.R. at 4; R.R. at 58a. Claimant weighed 326 pounds.

Claimant went to job interviews as directed, but not always at the specific time or date as specified by the vocational counselor. "I was never aware that times and dates were really important to go by, just as long I went and done [sic] the interview." N.T. at 13; R.R. at 166a. Claimant went to six job interviews without appointments. None of the employers expected him at the times specified by the vocational counselor in the job letters. N.T. at 19; R.R. at 172a. No actual interviews with employers were arranged. The vocational counselor never told Claimant to be at the job interviews at the times she specified so that she could assist him in the interviews, some of them at different times and dates than specified by the vocational counselor. Claimant called and set up his own interviews at times so that the prospective

employer was present. N.T. at 20; R.R. at 173a.

With respect to attending interviews at Today's Temporary, Claimant did not attend the interviews because he thought "the occupational resources were subletting this out to Today's Temporary." N.R. at 22; R.R. at 175a. Also, the letters he received never stated that a specific job was available. N.T. at 23; R.R. at 176a.

Claimant presented the deposition testimony of Michael E. Wald, M.D. (Dr. Wald), board certified in internal medicine and pulmonary disease. Dr. Wald first examined Claimant in 1991, and reevaluated him in May 1994. He found a history of asthma. "He [Claimant] relates that he first noted symptoms of wheezing and shortness of breath when he was exposed to trichlorethylene solvent." Deposition of Michael E. Wald, M.D. February 5, 1995, (Dr. Wald Deposition) at 9; R.R. at 664a.

Dr. Wald testified, "He [Claimant] did seek medical attention and was ultimately diagnosed as asthmatic . . . he's been under medical attention since his diagnosis back some nine or ten years ago." Dr. Wald Deposition at 9-10; R.R. at 664-665.

Dr. Wald testified within reasonable medical certainty that Claimant had asthma and that his asthma was "occupationally induced in that he relates absolutely no symptoms prior to his occupational exposure to trichlorethylene." Dr. Wald Deposition at 14; R.R. at 669a. Claimant's disability continues and limits him. "If one were to contemplate employment, it would have to be relatively sedentary activity . . . in an environment that does not expose him to a variety of irritants . . .." Dr. Wald Deposition at 17; R.R. at 672a.

Employer presented the deposition testimony of Dr. Fino, board certified in internal medicine and pulmonary disease. Dr. Fino examined Claimant on February 20, 1997, took a medical history, reviewed medical records and conducted tests. He diagnosed

Claimant as having "hyperactive airway disease due to previous smoking and asthma." Deposition of Gregory J. Fino, September 15, 1997, (Dr. Fino Deposition) at 12; R.R. at 238a. Dr. Fino opined Claimant did not have any functional disability due to occupationally induced asthma. Dr. Fino Deposition at 13; R.R. at 239a. Dr. Fino believed Claimant could return to his former job with "proper respiratory protection, plus proper environmental safety controls." Dr. Fino Deposition at 42; R.R. at 268a.

Employer presented the testimony of Georgette Gerben (Ms. Gerben), an occupational resource specialist. Ms. Gerben coordinated return to work activities including reviewing files and meeting with employers to develop employment opportunities. Deposition of Georgette Gerben, July 14, 1998, (Gerben Deposition) at 6; R.R. at 357a. Ms. Gerben testified that she received interview forms, sample applications and vocational interests and abilities tests from Claimant and medium duty restrictions from Dr. Fino. Gerben Deposition at 11; R.R. at 363a. Then, she sent referral letters telling Claimant of a specific time, place and date for an appointment to make application or interview. Gerben Deposition at 34; R.R. at 385a. She wanted to be present to assist him in filling out applications and also to observe the employee's demeanor and attitude in interviews. Gerben Deposition at 36; R.R. at 387a. Ms. Gerben sent Claimant three referral letters for appointments at Today's Temporary. Claimant did not appear at the appointments. Id.

On cross-examination, Ms. Gerben said an aggressive job search was performed for Claimant, "trying to locate a fair number of employment opportunities, usually one employment opportunity a week." Gerben Deposition at 43; R.R. at 394a. The insurance carrier, Gates McDonald, requested this approach. Id. Ms. Gerben was not aware of any referred job for which Claimant was not hired

because the referral was unscheduled. Gerben Deposition at 61; R.R. at 412a. She acknowledged that in some instances the positions he applied for had been filled even before she directed him to apply. Id.

With respect to the interviews scheduled at Today's Temporary, Ms. Gerben testified that there was "no specific job," just the general category of the entry level clerical position." Gerben Deposition at 62; R.R. at 413. The letters sent to Claimant did not indicate any job duties or any jobs. Id.

Employer presented the deposition testimony of Scott A. Livingstone (Livingstone), territory manager for Today's Temporary. Livingstone explained the process at Today's Temporary was to interview applicants and test them to determine their skills to "find out exactly how we might be able to help them find employment." Deposition of Scott A. Livingstone, July 14, 1998, (Livingstone Deposition) at 10, R.R. at 336a. On cross-examination, Livingstone noted that no job was identified for Claimant and, based on information received from Ms. Gerben, Livingstone would have recommended Claimant for a clerical position. Livingstone Deposition at 14; R.R. at 340a.

Employer presented the testimony of Kirk Williams (Williams), a private investigator. Notes of Testimony, December 8, 1998, (N.T. 12/8/98) at 5; R.R. at 106a. Williams testified that he videotaped Claimant climbing on a ladder and inspecting the roof of his mobile home. N.T. 12/8/98 at 6; R.R. at 107a.

The WCJ denied Employer's termination and modification petitions and made the following relevant findings of fact and conclusions of law:

FINDINGS OF FACT

11. This Workers' Compensation Judge finds that the deposition testimony of Dr. Fino is contrary to the decision and opinion of Judge Kenney rendered on March 30,

1993. This Workers' Compensation Judge further believes that Dr. Fino's testimony is neither credible nor persuasive based on the fact that Dr. Fino['s opinion that the claimant's condition is caused by obesity was determined in late February or early March of 1997. From the time of Dr. Fino's examination to the time of Dr. Wald's examination the claimant had lost approximately thirty pounds of weight but still had the same readings on examination in his lung capacity when Dr. Wald performed the readings in November. Therefore, the cause of obesity is disregarded by this Judge.

12. This Workers' Compensation Judge finds the deposition testimony of Dr. Wald to be credible and persuasive that the claimant still suffers an employment induced asthmatic condition. This Workers' Compensation Judge accepts Dr. Wald's opinion as it was accepted by Judge Kenney in a prior decision and that Dr. Wald also had the opportunity to examine the claimant on numerous occasions and has more of a comparative reasoning when rendering his opinion.

13. This Workers' Compensation Judge finds that the claimant is able to perform light duty work but is not able to return to his pre-injury employment with the defendant as a welder/fitter.

. . .

19. As the request for modification by the defendant employer is for the position of Today's Temporary Service, this Judge takes judicial

notice that the correspondence submitted as part of exhibits by the defendants does not indicate a specific job or rate of pay to which the claimant is applying for employment. In my conversation with Today's Temporary which should be noted that is now called Today's Staffing, this Judge found that there was no employment in Today's Temporary Service for the claimant but rather, they hold a list of individuals where they're able to offer to different employees in and around the city of Pittsburgh, Pennsylvania. This Judge goes on to note that the individual testifying on behalf of Temporary Service which is Scott Livingstone, is not certified as a rehabilitation consultant or specialist. Therefore, this Workers' Compensation Judge finds that Today's Temporary Service is not gainful employment that the claimant had an opportunity to obtain while being vocationalized through Occupational Resource Specialists, Inc., the employer for Georgette Gerben.

20. This Workers' Compensation Judge finds, based on the credible testimony of the claimant and also based on the information supplied by Ms. Gerben, that the claimant had applied for 11 of the 12 positions offered to him that were prospective employers through a rehabilitation process. Albeit the claimant may not have applied at the times requested by Ms. Gerben, there is no indication in the record or testimony from an employer that the application time created any problem with the

employer. This Judge notes that the only problem would have been that the vocational specialist would not have been there to hear any of the transaction between the job applicant, being the claimant, and the prospective employer. This Judge takes judicial notice that there were never interviews scheduled where the claimant had a direct opportunity for employment.

21. This Workers' Compensation Judge does not accept the testimony of Georgette Gerben, an occupational specialist, to be persuasive and supporting the defendant's position that a job offer was made to the claimant under the rules in Kachinsky [sic].

22. Based on the record as a whole dealing with the Modification Petition, this Workers' Compensation Judge finds that the claimant had presented himself when requested by the vocational specialist to submit job applications for numerous employers and that if Today [sic] Temporary was an employer rather than an employer provider, this Judge believes that the claimant would have applied also for that job based on his response to the numerous other jobs offered to him by Ms. Gerben.

. . .

CONCLUSIONS OF LAW

. . .

2. The defendant failed to sustain their [sic] burden of proof that the claimant no longer suffers any residual disabilities as a result of his July 3, 1991 work related injury and that his benefits

should cease and terminate based on the testimony of Dr. Fino.

3. The defendant failed to satisfy their [sic] burden of proof in the Modification Petition that the claimant failed or refused to attend an interview at Today's Temporary which would result in employment for the claimant. It is noted that Today's Temporary had no jobs available to him nor was there an indication of a position or a rate of pay to which the claimant was applying.

4. This Workers' Compensation Judge finds that the claimant satisfied his burden that he had applied for positions which the defendant representative had instructed him to, with the exception of Today's Temporary as that was not an employer but rather a party that employs individual for other parties.

(Although not a Conclusion of Law, this Judge notes that the defendant, at the drop of a hat, has taken task to the claimant to have him apply for positions and the jobs at Temporary Service was just an attempt to find a pig in a poke.)

WCJ's Decision, December 18, 2000, Findings of Fact Nos. 11-13 at 4, 19-20 at 7-8, Conclusions of Law Nos. 2-4 at 9; R.R. 15a-20a. Employer appealed to the Board, which affirmed.

On appeal[1] Employer contends (1) Claimant's benefits should have been modified based on his failure to attend three interviews with prospective employers on the dates and times requested by a vocational counselor, (2) the WCJ erred in conducting an independent investigation as to the nature of Today's Temporary after the close of the record and in basing a finding of fact upon the independent investigation; and (3) the WCJ erred in failing to make a finding of fact with respect to the videotape of Claimant made by an independent investigator.

Modification of Benefits based on failure to interview at Today's Temporary

Employer argues Claimant's benefits should be modified because Claimant's failure to attend three meetings at a temporary agency evidenced a lack of good faith, and a failure to comply with the obligations set forth in Kachinski v. Workers' Compensation Appeal Board (Vepco Construction Company), 516 Pa. 240, 532 A.2d 374 (1987).

An employer who petitions for modification of benefits bears the burden of proving that the claimant's disability has abated and that work is available for the claimant to perform. Kachinski specifies:

> 1. The employer who seeks to modify a claimant's benefits on the basis that he has recovered some or all of his ability must first produce medical evidence of a change in condition.

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[1]Our review is limited to a determination of whether an error law was committed, whether necessary findings of fact are supported by substantial evidence, or whether constitutional rights were violated. Vinglinsky v. Workmen's Compensation Appeal Board (Penn Installation), 598 A.2d 291 (Pa. Cmwlth. 1991)

2. The employer must then produce evidence of a referral (or referrals) to a then open job (or jobs), which fit in the occupational category for which the claimant has been given medical clearance . . .,
3. The claimant must then demonstrate that he has in good faith followed through on the job referrals.
4. If the referral fails to result in a job then claimant's benefits should continue.

Kachinski, 516 A.2d at 252, 532 A.2d at 380.

Employer argues Claimant's bad faith precluded Employer from showing job availability. The WCJ found that Employer never established that there was an open position through Today's Temporary and therefore, Employer failed to meet his burden.

"[T]his Court in deciding Kachinski, looked to the development of the job availability requirement . . . and construed Section 413 to require an employer seeking to modify benefits to demonstrate actual job availability." Landmark Constructors, Inc v. Workers' Compensation Appeal Board (Costello), 560 Pa. 618, 624, 747 A.2d 850, 853 (2000).

Ms. Gerben's and Mr. Livingstone's testimony indicated only that Today's Temporary would test and interview Claimant and then place his name on a list for referral. The record does not establish that Employer demonstrated an open position available for Claimant through Today's Temporary. In fact, the WCJ found that Today's Temporary had no actual job available for referral.

While it is true that Kachinski imposes a burden on Claimant to cooperate in good faith, Employer must first produce evidence of a then available job within Claimant's limitations. Since a showing of actual job availability is required, the WCJ did not err in finding Employer failed to sustain its burden under Kachinski and that Claimant's failure to attend

the three interviews was not a basis for modifying his benefits.

Modification of benefits based on failure to attend job interview at time specified by vocational counselor

Next, Employer argues Claimant's benefits should have been modified because he failed to attend prospective job interviews at the date and time specified by the vocational counselor. Employer contends that Claimant failed to apply for job interviews at the dates specified by the vocational specialist in order to avoid the vocational counselor and thus acted in bad faith.

The issue of whether a Claimant responded in good faith to job referrals is a determination of fact to be made by the workers' compensation judge. Champion Home Builders Co. v. Workmen's Compensation Appeal Board (Ickes), 585 A.2d 550 (Pa. Cmwlth. 1990). Here, the WCJ credited Claimant's testimony and found that Claimant did not apply at different times than those scheduled in order to avoid the vocational counselor as Employer asserts. Instead, Claimant applied at times when either a potential employer indicated he would be present or at earlier times when he was in the area. The WCJ is free to accept or reject in full or in part the testimony of any witness. Greenwich Collieries v. Workmen's Compensation Appeal Board (Buck), 664 A.2d 703 (Pa. Cmwlth. 1995). The WCJ committed no error when he concluded, based upon his findings of fact, that Claimant did not act in bad faith.

WCJ's independent investigation

Employer contends that the WCJ's independent investigation violated his right to confront and cross-examine a witness and constituted a violation of Employer's procedural due process rights. Essentially, the WCJ called Today's Temporary and talked to

a supervisor to determine what type of employment if any Today's Temporary offered.[2]

Sections 418, 420 and 437 of the Workers' Compensation Act[3] (Act) give the WCJ broad authority to investigate. The WCJ may investigate either before, during or after any hearing. 77 P.S. § 831, 833, 993. These sections of the Act do not provide authority to deny fundamental rights such as "confronting, cross-examining and refuting witnesses." City of Pittsburgh v. Workmen's Compensation Appeal Board, (Sherred), 315 A.2d 901, 903 (Pa. Cmwlth. 1974).

While this Court questions the wisdom of this legislatively authorized practice, critically in this instance, Employer does not assert how it has been harmed by its inability to cross-examine the witness that the WCJ interviewed. "To establish reversible error, the complaining party must prove that the court erred and that the error was harmful." Amoco Oil Co. v. Commonwealth Dept. of Transportation, 679 A.2d 1369, 1372, (Pa. Cmwlth. 1996), appeal denied, 547 Pa. 758, 692 A.2d 567 (1997).

The WCJ's independent investigation established only that Today's Temporary would not have directly employed Claimant in its own office but would have attempted to place him in with an outside employer. This was consistent with the testimony of Employer's witness, Mr. Livingstone.

This Court agrees with the Board that the question whether the WCJ properly conducted this investigation becomes irrelevant when the Employer did not first establish that it referred Claimant to a then open position at Today's Temporary. Since Employer failed to

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[2]Employer asserts the WCJ called this witness after the record was closed.

[3]Act of June 2, 1915, P.L. 736, as amended.

meet this prerequisite there was never an obligation on Claimant's part to interview at Today's Temporary.

In any event, the WCJ's independent investigation constituted harmless error. "Whether a fact-finder commits harmless error is a question for appellate review designed to advance judicial economy by obviating the necessity for a retrial where the appellate court is convinced that an error is harmless beyond a reasonable doubt." Harmon v. Mifflin County School District, 684 A.2d 651, 657 (Pa. Cmwlth. 1996), appeal denied, 548 Pa. 227, 696 A.2d 805 (1997).

Failure to make finding of fact regarding the videotape surveillance

Finally, Employer argues the WCJ failed to make an essential finding of fact with respect to the testimony of the investigator and the videotape showing Claimant on his roof. Employer contends that the contents of the videotape were inconsistent with Claimant's disability.

The WCJ has the prerogative to accept or reject in whole or in part the testimony of any witness. Alpo Petfoods, Inc. v. Workmen's Compensation Appeal Board (Neff), 663 A.2d 293 (Pa. Cmwlth. 1995). The WCJ need not review every item of evidence to satisfy the well-reasoned decision requirement of the Act. The decision must be sufficient for judicial review. In this instance, the WCJ specified the evidence he relied on, identified witnesses he found credible and explained why he found those witnesses credible.

Accordingly, we affirm.

/s/ BERNARD L. McGINLEY, Judge

BERNARD L. McGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Westinghouse Electric Corporation, Petitioner	:	
v.	:	
Workers' Compensation Appeal Board (Markovich), Respondent	:	No. 116 C.D. 2001

ORDER

AND NOW, this 14th day of September, 2001, the order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

/s/BERNARD L. McGINLEY, Judge
BERNARD L. McGINLEY, Judge

Certified from the Record
SEP 14, 2001
and Order Exit

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

WESTINGHOUSE ELECTRIC CORPORATION,	:	No. 580 WAL 2001
Petitioner,	:	
v.	:	Petition for Allowance of Appeal from Order of the Commonwealth Court and Petition for Supersedeas.
WORKERS' COMPENSATION APPEAL BOARD (MARKOVICH),	:	
Respondents.	:	

ORDER

PER CURIUM

AND NOW, this 5th day of March, 2002, the Petition for Allowance of Appeal is DENIED. The Petition for Supersedeas is also DENIED.

A True Copy Patricia Honard
As of March 5, 2002
Attest: /s/ Patricia Honard
Chief Clerk
Supreme Court of Pennsylvania

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

WESTINGHOUSE ELECTRIC CORPORATION,	:	No. 580 WAL 2001
Petitioner,	:	
v.	:	Petition for Reconsideration of Denial of Petition for Allowance of Appeal and Petition for Supersedeas
WORKERS' COMPENSATION APPEAL BOARD (MARKOVICH),	:	
Respondents.	:	

ORDER

PER CURIUM

AND NOW, this 12th day of April, 2002, the Petition for Reconsideration of Denial of Petition for Allowance of Appeal and Petition for Supersedeas is DENIED.

A True Copy Patricia Honard
As of: April 12, 2002
Attest: /s/ Patricia Honard
Chief Clerk
Supreme Court of Pennsylvania